

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PHILIP WONG, et al.,

No. C-07-2446 MMC

Plaintiffs,

v.

HSBC MORTGAGE CORPORATION (USA),
et al.,

**ORDER GRANTING DEFENDANTS'
MOTION FOR JUDGMENT ON THE
PLEADINGS OR, ALTERNATIVELY, TO
STRIKE; DENYING WITHOUT
PREJUDICE PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION**

Defendants

Before the Court are two motions: (1) defendants' Motion for Judgment on the Pleadings or to Strike Rule 23 Allegations, filed October 14, 2008; and (2) plaintiffs' Motion for Class Certification, filed September 5, 2008. The matters, having been fully briefed, came on regularly for hearing January 9, 2009. Paul J. Lukas and Bryan J. Schwartz of Nichols Kaster & Anderson, LLP appeared on behalf of plaintiffs. George J. Tichy II and Michelle R. Barrett of Littler Mendelson appeared on behalf of defendants. Having read and considered the papers filed in support and in opposition to the motions, and having considered the arguments of counsel made at the hearing, the Court rules as follows.

At the outset, defendants, in reliance on out-of-circuit authorities, seek judgment as to each of plaintiffs' ten state law claims on the theory a plaintiff cannot under any circumstances proceed, in a single case, with a collective action under the Fair Labor Standards Act ("FLSA") and a class action under state law. See, e.g., Herring v. Hewitt

1 Assoc., Inc., 2006 WL 2347875, at *2 (D. N.J. 2006) (holding “state law class action
2 allegations are legally incompatible with the federal [FLSA] statute”). The Court is not
3 persuaded, and finds the reasoning set forth in such decisions to be “flawed.” See Baas v.
4 Dollar Tree Stores, Inc., 2007 WL 2462150 (N.D. Cal. 2007); see also Thorpe v. Abbott
5 Laboratories, Inc., 534 F. Supp. 2d 1120, 1123-25 (N.D. Cal. 2008); Neary v. Metropolitan
6 Property & Casualty Ins. Co., 472 F. Supp. 2d 247, 250-51 (D. Conn. 2007). Rather,
7 where, as here, a district court’s jurisdiction over state law claims is alleged to be
8 supplemental in nature, the Court finds the issue of whether a federal and a state law claim
9 are properly heard in one action should be addressed under 28 U.S.C. § 1367. See, e.g.,
10 Neary, 472 F. Supp. 2d at 251.

11 A district court has supplemental jurisdiction over a state law claim where the federal
12 and state law claims “derive from a common nucleus of operative fact.” See Trustees v.
13 Desert Valley Landscape & Maintenance, Inc., 333 F.3d 923, 925 (9th Cir. 2003). Here, for
14 the reasons stated by defendants, the Court finds it lacks supplemental jurisdiction over
15 plaintiffs’ Ninth, Tenth, and Eleventh Claims for Relief, by which plaintiffs allege defendants
16 violated, respectively, California, New York, and New Jersey law, by taking unlawful
17 deductions from paychecks. In particular, the Court finds such claims bear no relation to
18 the exemption issues presented by the FLSA claim, and, indeed, plaintiffs have not
19 identified any material issues of fact common to the FLSA claim and to the unlawful
20 deductions claims.

21 Even where a district court has supplemental jurisdiction over state law claims, the
22 district court has the discretion to decline to exercise jurisdiction over claims that raise a
23 novel or complex issue of state law and/or claims that substantially predominate over the
24 federal claim. See 28 U.S.C. §§ 1367(c)(1), (c)(2). Here, the primary issues remaining for
25 resolution in plaintiffs’ FLSA claim are whether plaintiffs are exempt from the protections of
26 the FLSA under the “outside sales” exemption, see 29 C.F.R. § 541.500, and/or the “highly
27 compensated employees” exemption, see 29 C.F.R. § 541.601. The ten state law claims,
28 by contrast, raise a far greater number of issues, some of which are novel.

1 With respect to the state overtime claims, plaintiffs rely on the laws of three different
2 states, specifically, California, New York, and New Jersey. While it appears that only two
3 exemptions remain at issue as to the FLSA claim, defendants are relying on a significantly
4 greater number of exemptions under the laws of each of the states at issue. This
5 circumstance alone counsels against exercising supplemental jurisdiction. Concededly, a
6 “handful” of district courts, when exercising original jurisdiction over a FLSA claim, have
7 found it appropriate to exercise supplemental jurisdiction over a state overtime claim; such
8 cases, however, have involved the laws of one state, not, as here, multiple states. See
9 Neary, 472 F. Supp. 2d at 253 n.3 (citing cases).

10 In an effort to suggest the issues implicated solely by the state law claims will be
11 limited in number, plaintiffs, at the January 9, 2009 hearing, argued defendants should be
12 limited herein to each state’s outside sales exemption. Even if the Court accepts such
13 limitation, however, the state law claims would still present a number of additional legal and
14 factual issues not presented by the FLSA claim. Not only does the statutory language of
15 the outside sales exemption differ among the states at issue, each state’s language differs
16 from that set forth in the FLSA outside sales exemption. The federal test is “qualitative” in
17 nature, focusing on a determination of whether an employee’s “primary duty” is sales and
18 whether such employee is “customarily and regularly engaged away from his employer’s
19 place or places of business.” See Ramirez v. Yosemite Water Co., 20 Cal. 4th 785, 796,
20 798 (1999). By contrast, California law “differs substantially,” because it employs a
21 “quantitative method” focusing on whether the employee spends “more than half the
22 number of hours worked” engaged in outside sales. See id. New York and New Jersey
23 likewise appear to follow a more quantitative approach. New York law considers whether
24 the employee is “customarily and predominantly” engaged in sales outside of the office.

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1 See 12 N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.14(c)(5) (emphasis added)¹; see also
 2 Oxford English Dictionary, <http://dictionary.oed.com> (defining “predominant” as “having
 3 ascendancy, supremacy, or prevailing influence over others; superior” and as “constituting
 4 the main, most abundant, or strongest element”). New Jersey law requires analysis of
 5 whether an employee’s non-outside sales work “exceed[s] 20 percent of hours worked in
 6 the workweek” and a determination of whether such non-outside sales work is “work
 7 performed incidental to and in conjunction with the outside sales person’s own personal
 8 sales or solicitations.” See N.J. Admin. Code § 12:56-7.4(a).

9 Additionally, plaintiffs allege herein that defendants violated California law by
 10 “fail[ing] to provide [p]laintiffs . . . with meal periods as required by [state] law and . . . rest
 11 periods as required by [state] law.” (See Second Amended Complaint ¶ 57.) Such claim
 12 would require the resolution of numerous legal and factual issues not presented by the
 13 FLSA claim or by any other state law claim, including, but not limited to, the interpretation of
 14 the word “provide,” a presently unresolved issue of state law, see Brinker Restaurant Corp.
 15 v. Superior Court, 196 P. 3d 216 (Cal. 2008) (granting review of Court of Appeal decision
 16 interpreting “provide” for purposes of meal and rest periods), as well as a determination as
 17 to whether each plaintiff was provided with the requisite breaks and, if so, the length
 18 thereof, see 8 Cal. Admin. Code tit. 8, § 11070, subparts 11, 12 (setting forth maximum
 19 length of time employer may “employ any person” without providing meal breaks and rest
 20 breaks), and also a determination as to the applicability and scope of the good faith

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 22 ¹The Court notes that a New York regulation provides that an “employer shall pay an
 23 employee for overtime . . . in the manner and methods provided in and subject to the
 24 exemptions of [the FLSA],” see 12 N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.14(c)(5),
 25 which arguably suggests the New York outside sales exemption should be interpreted in
 26 the same manner as the FLSA outside sales exemption. As noted, however, the New York
 27 outside sales exemption and the FLSA outside sales exemption employ different language,
 28 which arguably suggests the state legislature intended an exemption different in scope from
 that provided under the FLSA. See N.Y. Statutes § 231 (“In the construction of a statute,
 meaning and effect should be given to all its language, if possible, and words are not to be
 rejected as superfluous when it is practicable to give to each a distinct and separate
 meaning.”); see, e.g., People v. Dethloff, 23 N.E. 2d 850, 852 (N.Y. 1940) (relying on New
 York presumption that legislature does not “deliberately place in [a] statute a phrase which
 [is] intended to serve no purpose”). New York state courts are better equipped than this
 Court to interpret their own state’s regulations.

1 defense asserted by defendants.²

2 Finally, as noted, plaintiffs have pleaded state law claims based on the allegation
3 that defendants took unlawful deductions from plaintiffs' paychecks. Even assuming,
4 arguendo, the Court has supplemental jurisdiction over those claims, the claims present a
5 number of different factual and legal issues not presented by the FLSA claim or by any
6 other state law claim, including, but limited to, whether any plaintiff agreed to the
7 deductions and, if so, whether such agreement is enforceable under state law, the nature
8 of any practice or policy by defendants regarding the deductions at issue herein, and
9 whether the lawfulness of such deductions, and/or calculation of damages, is dependent
10 upon whether such deductions were taken from base wages as opposed to commissions.

11 Accordingly, the Court finds plaintiffs' ten state law claims substantially predominate
12 over plaintiffs' relatively straightforward FLSA claim and present novel issues of state law.
13 Put another way, if said state law claims remain joined with the federal claim herein, the
14 "federal tail" will "wag what is in substance a state dog." See DeAsencio v. Tyson Foods,
15 Inc., 342 F.3d 301, 311 (3rd Cir. 2003). Under such circumstances, the Court declines to
16 exercise supplemental jurisdiction over the state law claims. See 28 U.S.C. §§ 1367(c)(1),
17 (c)(2).

18 CONCLUSION

19 For the reasons stated above:

20 1. Defendants' motion for judgment on the pleadings or to strike is hereby
21 GRANTED and the Court hereby DISMISSES the state law claims, specifically, the Second
22 through Eleventh Claims for Relief, without prejudice to plaintiffs' filing such claims in state
23 court.

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26 ²Each defendant has alleged, as its Twentieth Affirmative Defense, that it acted in
27 good faith. Whether such an affirmative defense is cognizable appears to present a novel
28 issue of state law; the Court has not located any decision addressing whether an employer
may assert a good faith defense to a claim that the employer failed to provide a required
meal and/or rest period.

1 2. Plaintiffs' motion for class certification is hereby DENIED as moot, in light of the
2 dismissal of the state law claims, and without prejudice.

3 **IT IS SO ORDERED.**

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5 Dated: January 21, 2009


MAXINE M. CHESNEY
United States District Judge